

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,) No. CR94-5708RJB
)
vs.)
) (Telephonic)
ERIC DETRICK McPHERSON,)
)
Defendant.)

MOTION FOR SENTENCE REDUCTION

BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT COURT JUDGE

April 10, 2020

APPEARANCES:

Helen Brunner
Assistant United States Attorney
Representing the Plaintiff

Jennifer Wellman
Federal Public Defender's Office
Representing the Defendant

10:13:11AM 1 THE COURT: My clock says 10:15. I think we can
10:15:11AM 2 get started. Let me first call the roll here and see who
10:15:14AM 3 is on the line.

10:15:15AM 4 Mr. Campbell, my courtroom deputy?

10:15:20AM 5 THE CLERK: Yes, sir.

10:15:23AM 6 THE COURT: Barry, my court reporter, are you on,
10:15:30AM 7 Barry?

10:15:31AM 8 THE COURT REPORTER: Yes, your Honor.

10:15:34AM 9 THE COURT: Ms. Wellman?

10:15:37AM 10 MS. WELLMAN: Yes. Good morning, your Honor.

10:15:39AM 11 THE COURT: Ms. Brunner.

10:15:42AM 12 MS. BRUNNER: Yes, your Honor. I'm here. Good
10:15:45AM 13 morning.

10:15:45AM 14 THE COURT: And is Mr. McPherson on the line?
10:15:53AM 15 Apparently not. I don't know, Ms. Wellman, did you make
10:15:58AM 16 some arrangement for him to call in?

10:16:02AM 17 MS. WELLMAN: I did, your Honor. His case
10:16:04AM 18 manager, Ms. Mitchell, forewarned yesterday that due to
10:16:13AM 19 staffing issues she wasn't sure whether she would be able
10:16:16AM 20 to pull it off, but she was going to do her best to try.
10:16:19AM 21 I know Mr. McPherson's mother was also going to try to be
10:16:24AM 22 on as part of the public, your Honor.

10:16:26AM 23 THE COURT: All right. Is there anyone who I
10:16:32AM 24 have not named that is going to participate in this
10:16:37AM 25 argument? I gather not.

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10:16:52AM 1 UNIDENTIFIED SPEAKER: No, your Honor. I just
10:16:54AM 2 wanted to mention that Michael Markham from Probation is
10:16:57AM 3 on the call.

10:16:59AM 4 MS. DOLVEN: And I am here, too, Judge Bryan.
10:17:03AM 5 This is Rachel Dolven.

10:17:06AM 6 THE COURT: Good, Rachel. That's my law clerk.

10:17:08AM 7 Well, let's get started with this. This is
10:17:11AM 8 Cause No. 94-5708, United States versus Eric Detrick
10:17:19AM 9 McPherson. It comes on this morning on the motion that
10:17:26AM 10 Mr. McPherson originally filed pro se, a request for
10:17:34AM 11 compassionate release. Since then he has been represented
10:17:43AM 12 by Ms. Wellman.

10:17:47AM 13 The parties have submitted substantial briefing.
10:17:53AM 14 I've read everything submitted and reviewed the file,
10:18:00AM 15 including the supplemental memorandum filed by
10:18:09AM 16 Ms. Wellman. I requested oral argument, and that's where
10:18:21AM 17 we are today.

10:18:25AM 18 We are doing this by conference call in light of the
10:18:33AM 19 courthouse closings and so forth as a result of the
10:18:39AM 20 COVID-19 virus and the general orders of the court. I
10:18:52AM 21 think we are all set to proceed with oral argument, unless
10:18:56AM 22 there is anything else preliminary that we should talk
10:19:01AM 23 about before we start?

10:19:06AM 24 MS. WELLMAN: Not from the defense, your Honor.

10:19:08AM 25 MS. BRUNNER: Not from the government, your

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10:19:09AM 1 Honor.

10:19:10AM 2 THE COURT: Well, Ms. Wellman, the floor is
10:19:15AM 3 yours, or the telephone line is yours.

10:19:18AM 4 MS. WELLMAN: I'm sorry. What was that? I
10:19:25AM 5 missed the question. I apologize.

10:19:27AM 6 THE COURT: It is not a question. I just said
10:19:30AM 7 that the floor is yours.

10:19:34AM 8 MS. WELLMAN: Thank you, your Honor. My
10:19:36AM 9 apologies.

10:19:37AM 10 So as your Honor knows, you set this hearing to
10:19:40AM 11 address two questions: The first, whether extraordinary
10:19:45AM 12 and compelling reasons in 3582 should be interpreted as
10:19:50AM 13 the ordinary meaning of those words, or is the meaning
10:19:54AM 14 limited by the guidelines policy statement in 1B1.13?

10:20:01AM 15 And the second, if not limited by the policy
10:20:04AM 16 statement, does Mr. McPherson present such extraordinary
10:20:09AM 17 and compelling reasons?

10:20:11AM 18 And the short answer is, yes, the ordinary meaning of
10:20:15AM 19 3582 controls, because there does not currently exist for
10:20:20AM 20 purposes of satisfying a First Step Act's consistency
10:20:25AM 21 requirement an applicable policy statement.

10:20:29AM 22 1B1.13 is as close as we get, but it has not been
10:20:35AM 23 amended following the First Step Act, and cannot be said
10:20:38AM 24 to reflect the legislative history or intent of the First
10:20:42AM 25 Step Act. Put differently, while 1B1.13 is illustrative,

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10:20:47AM 1 it is not binding.

10:20:49AM 2 As to the second question, yes, Mr. McPherson
10:20:52AM 3 presents extraordinary and compelling reasons for release.

10:20:55AM 4 Before I get into argument, I did hear someone else
10:20:59AM 5 join the call. With your Honor's permission, can we
10:21:02AM 6 confirm whether or not that is Mr. McPherson?

10:21:05AM 7 THE COURT: Yes, please. Who just came on the
10:21:07AM 8 line?

10:21:08AM 9 MS. MITCHELL: Hi. This is Ms. Mitchell calling
10:21:10AM 10 from the federal prison with Mr. McPherson.

10:21:15AM 11 THE COURT: Mr. McPherson, are you on the line?

10:21:21AM 12 THE DEFENDANT: I'm on the line.

10:21:23AM 13 MS. WELLMAN: Great. Thank you, your Honor.

10:21:30AM 14 THE COURT: Go ahead, Ms. Wellman.

10:21:33AM 15 MS. WELLMAN: Turning to the first question, the
10:21:35AM 16 meaning of extraordinary and compelling reasons is not
10:21:37AM 17 limited by the guidelines policy statement to the extent
10:21:42AM 18 the guidelines still reflect a dependence on the director
10:21:46AM 19 of the BOP.

10:21:48AM 20 The government's argument seems to be, in essence,
10:21:51AM 21 that the Court should be limited in its exercise of
10:21:55AM 22 discretion only to those circumstances in Subdivisions A
10:22:00AM 23 through C of the guidelines, and yet ignore the catch-all
10:22:06AM 24 in 1B1.13 comment note 1(D), absent a determination by the
10:22:12AM 25 director. In other words, they seem to be arguing that

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10:22:16AM 1 this Court is precluded from finding there exists an
10:22:21AM 2 extraordinary or compelling reason consistent with the
10:22:23AM 3 applicable policy statement, unless it falls in (A)
10:22:29AM 4 through (C).

10:22:30AM 5 I think that argument, based on the cases that I have
10:22:32AM 6 cited in the briefs, as well as Mr. McPherson cited in his
10:22:36AM 7 original motion, that the government's argument fails to
10:22:41AM 8 recognize the effect the legislative amendment under the
10:22:45AM 9 First Step Act has -- necessarily had on 1B1.3 -- I'm
10:22:52AM 10 sorry, 1B1.13.

10:22:55AM 11 As this Court knows, before the First Step Act, that
10:22:58AM 12 was the guideline policy statement with respect to a 3582
10:23:05AM 13 motion, and it was entirely premised on a motion by the
10:23:08AM 14 director of the BOP, and we see that in the introductory
10:23:15AM 15 paragraphs, as well as in the commentary.

10:23:17AM 16 Long story short, that very rarely happens with the
10:23:20AM 17 BOP as the gatekeeper. So the purpose of the First Step
10:23:26AM 18 Act was to remove the BOP in that role. Today, once
10:23:32AM 19 administrative remedies are exhausted, a court, like your
10:23:36AM 20 Honor, may find, independent of any motion, determination,
10:23:41AM 21 or recommendation by the BOP director, that extraordinary
10:23:44AM 22 and compelling reasons exist.

10:23:48AM 23 So understanding that, understanding the purpose of
10:23:51AM 24 the First Step Act, what it really did was effectively
10:23:55AM 25 amend 1B1.13 by eliminating any requirement that a

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10:24:00AM 1 sentence reduction -- your Honor's exercise of discretion
10:24:04AM 2 is dependent upon the director of the BOP.

10:24:09AM 3 Second, I think the caselaw supports including
10:24:15AM 4 *Stinson v. United States*, a Supreme Court decision, that
10:24:19AM 5 any assessment of whether a court -- the court acted
10:24:23AM 6 consistent with a guideline provision, again, has to be
10:24:29AM 7 informed by the Act's effect on that policy statement, and
10:24:32AM 8 here, Application Note 1B in particular.

10:24:36AM 9 The *Stinson* court was dealing with an amendment to
10:24:40AM 10 the guidelines in regards to, I believe -- I think it was
10:24:45AM 11 the crack cocaine amendments. And in that case -- I'm
10:24:50AM 12 sorry, felon in possession, the predicate for imposing the
10:24:55AM 13 career offender guideline.

10:24:57AM 14 And what the Court concluded there was that -- or
10:25:02AM 15 noted, one, a guideline, yes, should -- can interpret and
10:25:07AM 16 explain how a guideline can be applied, but they are
10:25:10AM 17 advisory. They do not trump a statute. And they have no
10:25:14AM 18 real weight if they violate a statute or are inconsistent
10:25:18AM 19 with that statute, like we assert 1B1.13 is with 3582.

10:25:30AM 20 1B1.13 has not been amended, and there is really no
10:25:34AM 21 sound basis for the contention that it is binding on the
10:25:39AM 22 Court's exercise of discretion absent that amendment,
10:25:44AM 23 where the intent of the First Step Act is exactly the
10:25:47AM 24 opposite of how it is currently written.

10:25:50AM 25 For example, the opening paragraph requires relief

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10:25:55AM 1 only upon motion of the director. The commentary has the
10:26:00AM 2 catch-all provision, "as determined by the director." The
10:26:04AM 3 commentary includes Note 4, that ties a reduction to the
10:26:09AM 4 motion by the director. These qualifiers, these prefatory
10:26:14AM 5 paragraphs, are no longer instructive, because they run
10:26:17AM 6 counter to the expressed intent of the First Step Act.

10:26:24AM 7 So really what the government is asking your Honor to
10:26:27AM 8 do in finding -- or limiting your authority or your
10:26:32AM 9 discretion is to really ignore the intent of the First
10:26:37AM 10 Step Act. And, again, nothing in the law requires or
10:26:40AM 11 supports that approach.

10:26:43AM 12 The cases the government relies on are really a
10:26:46AM 13 minority of cases that either hold on to the prerequisite
10:26:53AM 14 for the catch-all provision, or really are irrelevant to
10:26:58AM 15 the facts before this Court, or do not hold what the
10:27:03AM 16 government is saying they do.

10:27:05AM 17 For instance, the *Ebbers* decision, the government
10:27:10AM 18 cites it for this notion of Congress in fact only expanded
10:27:13AM 19 access to the courts, it didn't change the standard. But
10:27:16AM 20 really that comment was made in support of the notion that
10:27:21AM 21 the guidelines are helpful in defining a vague standard,
10:27:26AM 22 even if they are not binding.

10:27:31AM 23 Again, I think leaving the BOP director with the
10:27:35AM 24 authority to trigger and set the criteria for release
10:27:40AM 25 under 3582 long ago created several problems before the

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10:27:46AM 1 First Step Act. Those problems were meant to be addressed
10:27:49AM 2 by the First Step Act in removing the BOP resistance or
10:27:54AM 3 delay in permitting the Court to take a look at and
10:27:58AM 4 correct what may be a fundamentally unfair sentence due to
10:28:02AM 5 changed circumstances, the intent being federal judges are
10:28:06AM 6 no longer constrained or controlled by the BOP director.
10:28:10AM 7 Instead, the judges are encouraged to increase the use and
10:28:14AM 8 transparency of compassionate release.

10:28:17AM 9 So any reference to the BOP director in the
10:28:20AM 10 application notes requiring a determination or a motion by
10:28:26AM 11 the BOP is simply not binding.

10:28:28AM 12 That was laid out far better than I could do by the
10:28:32AM 13 district court in the *Maumau* decision, where the Court
10:28:36AM 14 said it is not for the district court -- it is for the
10:28:40AM 15 district court, not the BOP, to determine whether there
10:28:44AM 16 are extraordinary and compelling reasons.

10:28:45AM 17 And more recently in the *Redd* decision, the prefatory
10:28:49AM 18 language of Subsection (d) is part and parcel of the
10:28:53AM 19 eliminated requirement that relief must be sought by the
10:28:57AM 20 director in the first instance.

10:29:00AM 21 These decisions join the majority of courts
10:29:03AM 22 concluding the same thing, that the law, the intent,
10:29:07AM 23 normal constructs of statutory construction are consistent
10:29:11AM 24 with the policy statement itself without -- that the Court
10:29:17AM 25 is in a unique position to determine whether circumstances

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1 warrant a reduction and should not be bound by what the
2 director of the BOP has decided.

3 So bottom line, the guidelines are helpful, but they
4 are not binding, as urged by the government.

5 The second question that your Honor asked the parties
6 to address today is whether Mr. McPherson presents
7 extraordinary and compelling reasons for release. And
8 unless your Honor has questions for me, I will not repeat
9 my arguments, but I will summarize that I think the facts
10 about Mr. McPherson are not contested, although the
11 conclusion is.

12 He is suffering from serious physical and medical
13 conditions. To give the government the benefit of the
14 doubt, I think what -- their focus in their reply was on
15 the 924(c) stacking argument. But they certainly had the
16 records. In fact, that's how I got the records. And in
17 combing through there, there should be no doubt that he is
18 suffering from serious physical and medical conditions.

19 It's deteriorating physical health because of the
20 aging process, all of which substantially diminishes his
21 ability to provide self-care within the facility, and from
22 which he is not expected to recover.

23 So even putting aside Subsection 1(D) of the
24 guidelines, he qualifies, quite clearly, under Comment
25 Note 1, Subsection (A).

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10:30:51AM 1 And I would highlight for your Honor the McGraw
10:30:55AM 2 decision, in which the Court noted that many of the
10:31:00AM 3 conditions that Mr. McGraw had were fairly well managed or
10:31:04AM 4 controlled through medical treatment received while
10:31:07AM 5 incarcerated. Nevertheless, he warranted release.

10:31:14AM 6 Those facts, in addition to the fact that
10:31:16AM 7 Mr. McPherson would not receive the same sentence today.
10:31:21AM 8 The government does not dispute that fact. He has served
10:31:25AM 9 twice that, served either in prison or on supervision, by
10:31:28AM 10 his Caucasian co-defendant, who was the leader of the
10:31:31AM 11 offense, and actually held the firearm, simply because
10:31:35AM 12 Mr. McPherson exercised his right to trial.

10:31:39AM 13 His institutional history is exemplary, and his age
10:31:43AM 14 and medical condition, particularly his chronic
10:31:46AM 15 obstructive pulmonary disease, make him particularly
10:31:50AM 16 vulnerable to COVID-19.

10:31:53AM 17 So with all of those factors in play, he certainly
10:31:56AM 18 qualifies for leave under the catch-all provision of
10:31:59AM 19 comments to the guidelines, Note 1(D).

10:32:02AM 20 And I would say that every court [sic] that I have
10:32:05AM 21 read agreed that in circumstances like Mr. McPherson's --
10:32:10AM 22 his circumstances are indeed extraordinary and compelling,
10:32:14AM 23 and none of the cases relied on by the government are
10:32:18AM 24 factually similar or suggest otherwise.

10:32:21AM 25 I cited cases in the supplemental brief, as well as

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10:32:24AM 1 the reply, that were decided on 924(c) stacking alone. I
10:32:32AM 2 think the *Redd* decision said, and I quote, there is no
10:32:37AM 3 doubt that there is a gross disparity between the sentence
10:32:40AM 4 Mr. Redd received and the sentence he would have received
10:32:43AM 5 after the First Step Act. That disparity is primarily the
10:32:49AM 6 result of Congress's conclusion that the sentences like
10:32:52AM 7 Mr. Redd's are unfair and unnecessary. In effect, the
10:32:56AM 8 legislative rejection of the need to impose sentences
10:32:59AM 9 under 924(c), as originally enacted, as well as a
10:33:06AM 10 legislative declaration of what level of punishment is
10:33:09AM 11 adequate, these are, the Court finds, extraordinary and
10:33:13AM 12 compelling developments that constitute extraordinary and
10:33:16AM 13 compelling reasons that warrant a reduction to Mr. Redd's
10:33:19AM 14 sentence of incarceration.

10:33:23AM 15 Just yesterday I received word that three more courts
10:33:27AM 16 have followed suit, either on 924(c) alone, the new
10:33:32AM 17 stacking, and taking that into consideration, or on a
10:33:37AM 18 combination of circumstances given the COVID pandemic.

10:33:41AM 19 It includes a case out of Connecticut, a case out of
10:33:45AM 20 New York, and one just out of Alaska yesterday, April 9th,
10:33:51AM 21 *United States v. Plunk*. In *Plunk*, he was sentenced to two
10:33:55AM 22 concurrent life terms under the then 1994 mandatory
10:34:00AM 23 sentencing guidelines for conspiracy to distribute cocaine
10:34:04AM 24 and possession of cocaine with intent to distribute. The
10:34:09AM 25 pro se motion was based on his age, medical condition, and

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length of incarceration. It was also based on the dangers that this individual now faces as an inmate due to the ongoing national COVID-19 pandemic.

In that case, unlike this one, the government agreed that the release was a just result. The Court was not bound by that agreement, but concluded that was the right result, as well.

Compassionate release due to his medical condition and age, particularly in light of the ongoing coronavirus pandemic, and that significant time the individual has spent in custody, as well as that individual's remarkable history of rehabilitation while in custody, warranted release.

The same should happen here. That is the right, just result. It is the result demanded by compassion at the heart of the First Step Act and 3582 in the first place.

The other factors the Court must decide in determining whether, even if he qualifies, relief is warranted, I don't believe are disputed by the government. One, he is not a danger. Two, all 3553(a) factors support release for all of the reasons stated in my brief.

And although I was not the attorney in the hearings below, I have only known him for a short time, I would like your Honor to know that in my working with Mr. McPherson that he is an absolute gentleman.

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10:35:42AM 1 I would expect someone in his position to be
10:35:45AM 2 embittered by a system that penalized him for exercising
10:35:50AM 3 his constitutional right, and yet there is no bitterness,
10:35:53AM 4 there's no anger, there's only hope and kindness, a man
10:35:56AM 5 who has spent every day of the last 26 years trying to
10:35:59AM 6 educate himself, train himself, be good and kind. That is
10:36:04AM 7 the person before your Honor. So relief should be
10:36:07AM 8 granted.

10:36:08AM 9 Finally, I anticipate the government will argue that
10:36:11AM 10 if relief is granted Mr. McPherson should stay in custody
10:36:15AM 11 14 days. I oppose that request.

10:36:17AM 12 And if your Honor intends to entertain such a
10:36:20AM 13 request, I would like to be heard, as it too runs counter
10:36:24AM 14 to the facts, logic, and the Attorney General's April 3rd
10:36:28AM 15 memorandum to utilize home confinement where we can to
10:36:31AM 16 reduce the inmate population. I will defer to your Honor
10:36:34AM 17 as to when you would like me to address that issue. Thank
10:36:38AM 18 you.

10:36:39AM 19 THE COURT: Okay. Thank you, Ms. Wellman.

10:36:41AM 20 Ms. Brunner.

10:36:43AM 21 MS. BRUNNER: Yes, your Honor. Several points
10:36:47AM 22 here. And I would like to start, perhaps, at a slightly
10:36:51AM 23 different place, and that is what the First Step Act did
10:36:55AM 24 and did not do and what Congress did and did not do when
10:37:00AM 25 it enacted it. Because if we start there, I think the

10:37:04AM 1 Court will at least understand the government's position.

10:37:09AM 2 This matter came before the Court with
10:37:14AM 3 Mr. McPherson's pro se motion, which was then followed by
10:37:19AM 4 counsel's reply brief. And the focus -- much of the focus
10:37:26AM 5 was on the stacked 924(c) sentences.

10:37:30AM 6 So let me start there. What the First Step Act did,
10:37:35AM 7 of course, was change the nature of how the increased
10:37:41AM 8 sentence for a second offense is to be applied, that is to
10:37:44AM 9 say, it is to be applied only after a first conviction has
10:37:51AM 10 become final, thereby reversing the Supreme Court's old
10:37:56AM 11 decision in *Deal*.

10:37:58AM 12 What Section 403 did not do, however, is make that
10:38:02AM 13 change retroactive. I raise that because that is in
10:38:05AM 14 contrast with what it did for the mandatory minimum
10:38:08AM 15 penalties applicable to crack cocaine offenses that
10:38:12AM 16 resulted from the Fair Sentencing Act. The First Step Act
10:38:16AM 17 made those retroactive. So it was a conscious decision
10:38:20AM 18 not to change this. Why? I don't know. But it was a
10:38:24AM 19 conscious decision.

10:38:26AM 20 What the Act also did was allow defendants to file
10:38:29AM 21 motions under 3582(c)(1) for compassionate release, and no
10:38:35AM 22 longer limiting those motions to those filed by the
10:38:40AM 23 director of the BOP.

10:38:42AM 24 There is no dispute here that this Court does not
10:38:46AM 25 have to wait for the director of BOP, and in fact can

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10:38:50AM 1 disagree with a recommendation made by the director of BOP
10:38:56AM 2 or how they would see these factors.

10:38:59AM 3 Having said that, what the Act did not change is
10:39:03AM 4 anything else in the statute. It didn't change the
10:39:06AM 5 provision that makes release contingent on whether a
10:39:10AM 6 reduction would be consistent with the applicable policy
10:39:15AM 7 statement adopted by the Sentencing Commission.

10:39:18AM 8 And this Court must presume that Congress legislated
10:39:23AM 9 with an understanding of what that provision provided at
10:39:26AM 10 the time that it enacted the First Step Act, and also with
10:39:29AM 11 an understanding that at the time there wasn't a quorum on
10:39:36AM 12 the Sentencing Commission, something that's true a year
10:39:39AM 13 and a half later still, and that as a result there would
10:39:42AM 14 be no change to 1B1.13 as a result.

10:39:49AM 15 Moreover, it didn't add any factors for the Court to
10:39:52AM 16 consider beyond what was in the statute, and it didn't
10:39:55AM 17 direct the Sentencing Commission to change the policy
10:39:58AM 18 statement in any way.

10:40:02AM 19 It's fair to assume, I think, with all of those
10:40:05AM 20 things taken together, that it understood that what was
10:40:10AM 21 laid out in 1B1.13 as to what are the kinds of things that
10:40:20AM 22 constitute extraordinary and compelling reasons should
10:40:23AM 23 remain.

10:40:25AM 24 And that was not the focus here. Rather, the focus
10:40:27AM 25 was not allowing BOP to be the arbiter. Rather, giving

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10:40:32AM 1 that decision-making power to this Court. On that point,
10:40:38AM 2 we have no argument.

10:40:40AM 3 I would also point out what the Fair Sentencing Act
10:40:43AM 4 didn't do, interestingly, is it did not amend 28 U.S.C.
10:40:49AM 5 994(t), the statute that directed the Sentencing
10:40:53AM 6 Commission to adopt the policy statement, and which states
10:40:56AM 7 that rehabilitation alone is not, without more, an
10:41:02AM 8 extraordinary and compelling reason to grant release.

10:41:05AM 9 So that is where the government's position begins and
10:41:12AM 10 ends. There's no doubt that this Court can reach
10:41:15AM 11 different conclusions than the BOP might reach. But the
10:41:20AM 12 statutory authority is now not totally extended to allow
10:41:26AM 13 anything beyond what is laid out there, which focuses on
10:41:32AM 14 age, disabilities, medical conditions, or family
10:41:36AM 15 circumstances that could be unforeseen, where children,
10:41:43AM 16 for example, would be left without a guardian or a
10:41:46AM 17 caretaker, that kind of issue.

10:41:50AM 18 Now, let me just address briefly Mr. McPherson's
10:41:54AM 19 circumstances. No doubt he is serving a very long
10:41:55AM 20 sentence --

10:41:56AM 21 THE COURT: Let me ask you a question before you
10:42:00AM 22 turn to that. The guideline book I have in front of me is
10:42:11AM 23 the 2018 book. I think it is the same policy statement.
10:42:25AM 24 But at the end of that is the background about what the
10:42:34AM 25 Sentencing Commission should do. When was that background

10:42:45AM 1 adopted and by whom? It wasn't the Sentencing Commission,
10:42:59AM 2 because it says, "The Commission is required by statute."
10:43:07AM 3 I am curious when that was adopted and who adopted it.

10:43:16AM 4 MS. BRUNNER: Your Honor, that was adopted -- the
10:43:17AM 5 background statement, obviously, was written by the
10:43:21AM 6 Sentencing Commission, but it references 28 U.S.C. 994,
10:43:25AM 7 which was enacted as part of the Sentencing Reform Act way
10:43:31AM 8 back when.

10:43:35AM 9 I can't say when -- whether Subsection (t) -- I did
10:43:41AM 10 not research whether it has been amended over time. But
10:43:47AM 11 Subsection (t) was part of that. And Subsection (t)
10:43:51AM 12 directs the Sentencing Commission to promulgate this
10:43:53AM 13 general policy statement regarding sentence modifications
10:43:57AM 14 under Section 3582(c)(1)(A), which is what we are talking
10:44:01AM 15 about here.

10:44:10AM 16 Does that answer the Court's question?

10:44:12AM 17 THE COURT: Well, I think it's as near as you
10:44:17AM 18 can. Go ahead, Ms. Brunner.

10:44:20AM 19 MS. BRUNNER: I was going to note, I guess,
10:44:28AM 20 having considered all of those factors about what the
10:44:31AM 21 First Step Act did and did not do, the question then is
10:44:36AM 22 whether Mr. McPherson has demonstrated, and counsel on his
10:44:44AM 23 behalf, extraordinary and compelling reasons.

10:44:48AM 24 The reason we took the position we did is, we don't
10:44:52AM 25 think this Court can, through this provision, address the

10:44:58AM 1 stacked 924(c) .

10:45:00AM 2 We certainly understand that this is an extremely
10:45:03AM 3 long sentence. It is accurate to say he would be unlikely
10:45:13AM 4 to get that length of a sentence today if he were to be
10:45:17AM 5 sentenced. It is also true at the time that -- although
10:45:22AM 6 he is not described as the leader, that if one goes back
10:45:27AM 7 and looks at the presentence report, he was also the
10:45:31AM 8 person who most terrified the victims in this case. Even
10:45:35AM 9 though his co-defendant was the one holding the gun, he
10:45:39AM 10 was the one who was threatening them behind the counter.

10:45:44AM 11 I know that when 23 years pass that there is a -- in
10:45:50AM 12 this case I guess it is 26 years passed, that we have a
10:45:54AM 13 different person today than we had at the time. But there
10:45:58AM 14 was some reason why there was concern at the time.

10:46:02AM 15 In terms of his health, I think it is interesting
10:46:05AM 16 here that the one issue that Mr. McPherson didn't focus on
10:46:10AM 17 at the time he filed his motion in January was his health.
10:46:17AM 18 There is one paragraph towards the end of the motion.
10:46:21AM 19 This is now the focus of -- much of the focus of the
10:46:28AM 20 argument by defense.

10:46:29AM 21 It is certainly clear that he has some health issues,
10:46:33AM 22 but he is not totally debilitated by any means. He is not
10:46:41AM 23 a young man. And maybe this is a function of my age
10:46:46AM 24 versus the age of others, but I don't also consider him
10:46:50AM 25 elderly.

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1 I also understand that COVID is a very, very serious
2 illness, and that someone with various preexisting
3 conditions will be more at risk, but I would point out
4 that the facility at which he is located, at least as of
5 this morning, there are no positive COVID cases. The BOP
6 has been taking extraordinary measures to try and limit
7 the introduction in any way of this disease into the
8 prison system.

9 They have been mostly successful. Eighty-eight out
10 of their 124 facilities -- 85 rather, have no staff or no
11 inmate with COVID. The fact that it is a serious illness
12 means that even if this Court releases him doesn't
13 guarantee that he wouldn't get it on the outside.

14 As to the 14-day period, if the Court disagrees with
15 the government on the legal analysis, and believes that he
16 has made the extraordinary and compelling reasons to
17 reduce his sentence now, part of the reason we are asking
18 for the 14 days is, in part, to ensure that not only he is
19 protected, but that the community is protected.

20 It's a provision that has been put in place. It is
21 being used even in those cases where the Attorney General
22 has granted extra authority, thanks to the CARES Act, to
23 allow people to be moved to home detention that meet
24 certain criteria. All of those people are kept in
25 quarantine for 14 days before they are allowed to leave,

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10:48:43AM 1 for everyone's protection.

10:48:46AM 2 We would ask that be put into place if the Court is
10:48:52AM 3 inclined to agree that he should get a reduction in
10:48:56AM 4 sentence.

10:48:58AM 5 THE COURT: Just hold on a minute. Let me think
10:49:01AM 6 about this and see if I have some questions. Let's turn
10:49:25AM 7 to the basic question here, Ms. Brunner, and that is, why
10:49:34AM 8 do you want to keep this fellow in custody?

10:49:37AM 9 MS. BRUNNER: Your Honor, let me answer the
10:49:41AM 10 question this way: I think my job is to advocate what the
10:49:50AM 11 government certainly believes the law allows and what it
10:49:54AM 12 does not allow.

10:49:57AM 13 If you were asking me in the abstract, without the
10:50:00AM 14 legal constructs that I think apply in this case, whether
10:50:05AM 15 I think Mr. McPherson needs more time, I might tell you
10:50:11AM 16 no. But that's not the place that I am able to advocate
10:50:19AM 17 for. I am not his advocate. I think that my job is to
10:50:26AM 18 inform the Court what I think the statutory restrictions
10:50:29AM 19 are.

10:50:30AM 20 And where the argument is almost entirely focused on
10:50:36AM 21 the fact that he has gotten a lengthier sentence than he
10:50:40AM 22 would receive today, but Congress chose not to make those
10:50:46AM 23 changes retroactive, that is something that I don't have
10:50:51AM 24 an ability to change.

10:50:54AM 25 THE COURT: Okay. I understand. Thank you.

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10:50:59AM 1 Ms. Wellman, any response?

10:51:01AM 2 MS. WELLMAN: Thank you, your Honor. Briefly.
10:51:05AM 3 One, with respect to the 924(c) stacking laws not being
10:51:10AM 4 retroactive, as I pointed out in our brief, that just
10:51:14AM 5 because something is not retroactive, that doesn't mean
10:51:17AM 6 that your Honor is foreclosed from considering it and
10:51:22AM 7 other avenues for relief, like here, compassionate relief.

10:51:28AM 8 The government's argument basically says to this
10:51:30AM 9 Court to read into 3582 that compassionate relief can be
10:51:36AM 10 granted in extraordinary cases, except 924 cases, or, like
10:51:44AM 11 *Plunk*, mandatory life sentences. And we know nothing of
10:51:48AM 12 the sort is in the statutory language.

10:51:50AM 13 I would encourage your Honor to look at the *Maumau*
10:51:53AM 14 decision that makes very clear that your Honor has the
10:51:57AM 15 authority to revisit a defendant's sentence in this
10:52:00AM 16 context.

10:52:01AM 17 Second, the government's arguments were made in *Redd*
10:52:07AM 18 and *Maumau*, and soundly rejected. And I want to be clear,
10:52:12AM 19 there does not currently exist for purposes of satisfying
10:52:16AM 20 3582's consistency applicable -- with an applicable policy
10:52:24AM 21 statement any provision, because the Commission has not
10:52:27AM 22 met post-First Step Act to do so. So 1B1.13 is as close
10:52:34AM 23 as we get. And we know it doesn't reflect the intent of
10:52:40AM 24 the First Step Act, and yet it should be informed by the
10:52:47AM 25 First Step Act.

10:52:49AM 1 The third thing, Ms. Brunner mentioned
10:52:57AM 2 Mr. McPherson's role in the offense. Neither
10:52:59AM 3 Mr. McPherson nor I are suggesting the offense wasn't
10:53:04AM 4 serious, it absolutely was, or that it was a legal
10:53:08AM 5 sentence at the time. It was. It was affirmed on appeal,
10:53:13AM 6 as well. The question before the Court, though, is
10:53:15AM 7 whether there are changed circumstances that warrant
10:53:19AM 8 revisiting the fairness of that sentence today.

10:53:25AM 9 Finally, with respect to Mr. McPherson's focus in his
10:53:34AM 10 original pro se motion, he did note his medical
10:53:41AM 11 conditions. I would suggest the reason he did not raise a
10:53:44AM 12 1(a) ground for release is, one, pride, as he should have
10:53:49AM 13 pride, in that he works.

10:53:51AM 14 But as I noted, in actually combing through the
10:53:54AM 15 records, he desaturates on a six-mile -- minute walk. He
10:54:02AM 16 is confined to a lower bunk. He uses a CPAP machine. He
10:54:06AM 17 can't walk up stairs. He can't lift more than 25 pounds.
10:54:09AM 18 The caselaw does not require that you are unable to do
10:54:14AM 19 your daily routine. So for that I would say that, at a
10:54:19AM 20 minimum, it still should inform the catch-all provision
10:54:25AM 21 and warrant relief.

10:54:29AM 22 With respect to Ms. Brunner's comment about the 14
10:54:32AM 23 days to quarantine, would your Honor like me to address
10:54:37AM 24 that now or wait?

10:54:39AM 25 THE COURT: Well, this is your only chance.

10:54:44AM 1 MS. WELLMAN: With respect to that, I understand
10:54:47AM 2 and I appreciate the steps that the Bureau of Prisons is
10:54:50AM 3 trying to take. And I do have to give a shout out to
10:54:53AM 4 Mr. McPherson's case manager, Ms. Mitchell, who is on the
10:54:57AM 5 phone and has made it so that I can communicate with
10:55:00AM 6 Mr. McPherson, and she made it so he could be on the call
10:55:05AM 7 today.

10:55:05AM 8 But the Attorney General's April 3rd memorandum on
10:55:08AM 9 home confinement specifically talks about prioritizing the
10:55:13AM 10 transfer of inmates to home confinement where appropriate
10:55:16AM 11 to decrease the risk to their health.

10:55:19AM 12 The government made this argument in *Resnick* in
10:55:24AM 13 New York about, "Well, they don't have it in the facility,
10:55:28AM 14 you but he should still serve another 14 days in
10:55:31AM 15 quarantine before he is released to the community." That
10:55:34AM 16 individual had served a little over three years of a
10:55:38AM 17 six-year sentence, and he was granted relief due to
10:55:41AM 18 medical conditions in combination with his particular
10:55:45AM 19 vulnerability to COVID-19. He's 65 years old, in
10:55:50AM 20 relatively stable health, but had liver disease.

10:55:53AM 21 And, again, the government there, like here, after 14
10:55:57AM 22 days, rather than release to his home with his wife, in
10:56:01AM 23 keeping with Barr's memo -- March 26th memo, the defense
10:56:06AM 24 in that case, like I am, argued that such a quarantine is
10:56:10AM 25 not warranted by the situation and would subject him to

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10:56:14AM 1 additional unnecessary risk of contracting COVID-19. The
10:56:18AM 2 Court there agreed, saying, quote, releasing a prisoner
10:56:22AM 3 who is for all practical purposes deserving of
10:56:24AM 4 compassionate release during normal times is all but
10:56:29AM 5 mandated in the age of COVID-19, end quote.

10:56:32AM 6 Here, like in that case, there is a release plan that
10:56:37AM 7 has been approved, thanks to Probation Officer Markham,
10:56:41AM 8 who I know is listening to this call. And no doubt it is
10:56:44AM 9 in keeping with the shelter-in-place rules, given
10:56:48AM 10 Ms. Johnson, his mother, is a retired professional in the
10:56:53AM 11 medical community. She has a three-bedroom home in which,
10:56:56AM 12 if necessary, she can observe quarantine protocol on site.
10:57:00AM 13 She knows the medical system well, has access to medical
10:57:03AM 14 care, and this environment is significantly better than
10:57:07AM 15 anything FMC Lexington can put into place, despite the
10:57:13AM 16 BOP's best efforts.

10:57:14AM 17 So where we know his risk is far greater inside the
10:57:19AM 18 institutional walls than at home, I would ask your Honor
10:57:23AM 19 to not only grant release, because it is -- he qualifies
10:57:27AM 20 and it is warranted, to home, in that it will not increase
10:57:34AM 21 the risk to Mr. McPherson of contracting COVID-19 or the
10:57:38AM 22 community at large. Thank you, your Honor.

10:57:43AM 23 THE COURT: Okay. Thank you both. I will start
10:57:50AM 24 writing and get the opinion out to you in an order as soon
10:57:57AM 25 as I can. But it will be early next week, I'm afraid,

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1 with the weekend coming up and so forth, and also the
2 difficulty within chambers of passing drafts back and
3 forth, and so forth, with my law clerks.

4 Thank you all very much. Your arguments have been
5 helpful. I think I understand the situation. We will be
6 adjourned. Thank you.

7 MS. WELLMAN: Thank you, your Honor.

8 MS. BRUNNER: Thank you, your Honor.

9 THE DEFENDANT: Thank you.

10 (Proceedings adjourned.)
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C E R T I F I C A T E

I, Barry Fanning, Official Court Reporter for the
United States District Court, Western District of
Washington, certify that the foregoing is a true and
correct transcript from the record of proceedings in the
above-entitled matter.

/s/ Barry Fanning
Barry Fanning, Court Reporter